



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2013-0087]

Limited Service Exclusion for Household Goods Motor Carriers and Related Registration Requirements for Brokers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; request for public comment.

SUMMARY: FMCSA provides notice and requests comments on the Agency's process for determining the appropriate use of the Limited Service Exclusion (LSE), a statutory exception to the definition of Household Goods (HHG) motor carrier provided at 49 U.S.C. § 13102(12)(C). In addition, this notice explains the registration requirements of brokers that arrange for the transportation of shipments that are eligible for the LSE.

DATES: You must submit comments on or before [30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA-2013-0087 by any one of the following methods:

- **Federal eRulemaking Portal:** Go to [http:// www.regulations.gov](http://www.regulations.gov). Follow the online instructions for submitting comments.
- **Fax:** 1- 202-493-2251.
- **Mail:** Docket Management Facility, (M-30), U.S. Department of Transportation (DOT), 1200 New Jersey Avenue, SE., West Building Ground Floor, Room 12-140, Washington, DC 20590-0001.

- Hand Delivery: Same as mail address above, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. All submissions must include the Agency name and docket number for this notice. See the “Public Participation” heading below for instructions on submitting comments and additional information.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Rodgers, Commercial Enforcement and Investigations Division, U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. Telephone (202)366-3031 or CIE_mailbox@dot.gov. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal and/or copyrighted information you provide.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA-2013-0087), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but

please use only one of these means. FMCSA recommends that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov> and insert “FMCSA-2013-0087” in the “Search” box, and then click the “Search” button to the right of the white box. Click on the top “Comment Now” box which appears next to the notice. Fill in your contact information, as desired and your comment, uploading documents if appropriate. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period and may change this enforcement policy based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov> and insert “FMCSA-2013-0087” in the “Search” box and then click on “Search.” Click on the “Open Docket Folder” link and all the information for the notice, and the list of comments will appear with a link to each one. Click on the comment you would like to read. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act

All comments received will be posted with personal information you have provided to <http://www.regulations.gov>. Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System published in the Federal Register on December 29, 2010 (75 FR 82132), or you may visit <http://www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32876.pdf>.

Background

The Limited Service Exclusion (LSE) is a statutory provision that pertains to the definition of "household goods motor carrier" at 49 U.S.C. § 13102(12)(C). Congress defined a HHG motor carrier in 49 U.S.C. § 13102(12)(A) as a "motor carrier that, in the ordinary course of its business of providing transportation of household goods, offers some or all of the following additional services: (i) Binding and nonbinding estimates; (ii) Inventorying; (iii) Protective packing and unpacking of individual items at personal residences; and (iv) Loading and unloading at personal residences."

Through the LSE, Congress specifically excluded certain motor carriers from the definition of HHG motor carrier: "[W]hen the motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier) . . ." the carrier is not considered a HHG motor carrier. 49 U.S.C. § 13102(12)(C). Transportation falling under the LSE is not subject to the consumer protection regulations applicable to HHG

shipments at 49 CFR Part 375, HHG motor carrier registration requirements at 49 CFR Part 365, or the cargo insurance requirements at 49 CFR Part 387.

The FMCSA is issuing this notice to provide clarity on those transportation services which fall within the scope of the LSE. The Agency has examined the legislative history relating to this provision, which makes clear that Congress intended to distinguish traditional, full service moving companies that offer some or all of the “additional services” noted above from “a motor carrier solely providing transportation of household goods entirely packed in, or unpacked from, one or more containers....” Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, § 4202(b), Pub. L. 109-59, Conf. Rep. No. 109-203.

The FMCSA understands that Congress thereby intended to create an economic opportunity for companies providing a lower cost, “no frills” moving option for shippers willing to pack their own belongings or to hire separate labor. Congress directed, however, that the loading and unloading may not be provided by an agent or employee of the company transporting the packed container.

Enforcement Policy and Process

Regarding the applicability of the LSE to specific entities, given the varied nature of the moving industry, FMCSA has concluded that whether an individual motor carrier is or is not eligible for the LSE must be determined on a case-by-case basis, taking into account the entirety of the relationship between a motor carrier and the individual that loads and unloads the HHG.

For enforcement purposes, the factors relevant to the determination of whether or not the LSE should apply are:

1) Website statements and other advertising, including claims or statements implying that the container company will provide HHG packing or other specialized services, or, by contrast, disclaiming HHG motor carrier status and clarifying that the company does not provide such services;

2) The level of control by the motor carrier over the individual providing packing and loading services;

3) The organizational structure of the motor carrier and the relationship of that entity to the individual providing loading and unloading services;

4) Commonality of employees between the motor carrier and any entity providing loading and unloading services, including, but not limited to corporate officers;

5) The nature of referrals for loading and packing services;

6) The nature and extent of business income derived from the referral for packing and loading services;

7) Other factors that may be relevant to defining the relationship between the motor carrier and individual providing packing and loading services; or

8) Other factors relevant to a determination that a motor carrier holds itself out as providing “full service” HHG services.

FMCSA believes that Congress did not intend the LSE as a mechanism for companies engaged in traditional household goods moving to evade regulatory oversight. Thus, the Agency will examine very closely any company statements on the Internet or in other advertising claiming to offer “full service moving” or similar comprehensive moving service packages. The Agency will generally deem companies holding

themselves out as HHG movers through such statements to be, in fact, HHG movers and ineligible for the LSE.

By statute, the LSE also does not apply where the relationship between a motor carrier and the individual that loads or unloads the HHG is determined to be that of an employer/employee or principal/agent. Under these circumstances, FMCSA will consider the container company a HHG motor carrier if it meets the definition of HHG motor carrier under 49 U.S.C. § 13102(12)(A).

While no single factor is paramount in assessing the business relationships between a container company and loading/packing labor, the extent of a motor carrier's control over the individual performing the loading/packing service is highly significant. Generally, the closer the relationship between the motor carrier and the individual loading/unloading the HHG, the less likely the motor carrier will be to qualify for the LSE. FMCSA will take into account the totality of the circumstances in defining the relationship between the motor carrier and the individual loading and unloading. As noted, FMCSA determines eligibility for the LSE on a case by case basis, utilizing factors including those above.

We are seeking comments on the Agency's factors for determining if the operation is eligible for the LSE.

The following examples illustrate how FMCSA would determine if the LSE applies.

Example A

Bach's Movers, a container company, advertises itself as "The Lowest Cost Moving Option" on its company website. The website has a link to "XYZ Moving

Helpers” and recommends that Bach’s customers contact XYZ directly for assistance with packing and unpacking. FMCSA investigation reveals that XYZ pays Bach’s a 3 percent referral fee for every customer that contracts with XYZ after visiting Bach’s website. Two of Bach’s employees work part time for XYZ on weekends. The two companies have separate management, however, and FMCSA has no information suggesting that Bach’s owns or controls the operations of XYZ. Bach’s is eligible for the LSE and is not a HHG mover.

Example B

Q-Bic Crates Movers, Inc. claims on its website to be a “Top Notch Moving Company” and to provide “the lowest cost, high quality moving services.” Q-Bic Crates provides binding and nonbinding estimates and inventorying services. The company’s website refers customers to Q-Bic Muscles, Inc. for assistance with packing and unpacking. FMCSA has received complaints that when Q-Bic Crates employees deliver containers to shippers’ homes, they attempt to pressure shippers into signing agreements for labor from Q-Bic Muscles. Investigation reveals that Q-Bic Crates Movers and Q-Bic Muscles have owners and officers in common, are run out of the same location and pool their revenue to pay salaries to several of the same individuals. Approximately 95 percent of Q-Bic Muscles’ revenue is from Q-Bic Crates customers. Q-Bic Crates is not eligible for the LSE and must comply with the consumer protection and other regulations applicable to HHG motor carriers.

Definition of the Term “Agent”

One determinant of whether or not a carrier is providing transportation that qualifies for the LSE is whether an “agent” of the carrier is performing loading and

unloading services. The FMCSA defines the term "agent" by applying its commonly accepted meaning: "one who is authorized to act for or in place of another; a representative." Black's Law Dictionary, (8th ed. 2004). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control and the agent manifests assent or otherwise so consents to act." Restatement (Third) of Agency § 1.01. What does or does not constitute authorization to act for or in place of another will depend upon the details and circumstances of the parties' relationship.

Whether an Entity is Operating as a HHG Broker

The FMCSA defines a "household goods broker," in part, as a person that arranges "for transportation of household goods by motor carrier for compensation." 49 CFR § 371.103. Therefore, whether or not a broker is a "household goods broker" is based upon whether "transportation of household goods" is taking place. The FMCSA and its predecessor, the Interstate Commerce Commission (ICC), have long focused on the nature of the service, as opposed to the physical goods being transported, to determine whether HHG transportation is taking place. See e.g., American Intermodal Services, Inc., Extension – Nationwide Contract Carrier Service, 1987 WL 100149, at *2 (ICC decided Dec. 22, 1987) ("[T]he mere transportation of containerized household goods without the provision of the specialized service or equipment normally required for such commodities is not within the definition of household goods transportation and may be performed under 'general commodities (except household goods)' authority."). In June 2001, FMCSA issued an opinion that was in agreement with the underlying rationale of

the ICC decisions -- that the HHG regulatory requirements are directed at a discrete segment of the transportation industry that provides specialized services in specialized equipment. Therefore, arranging for shipments that are transported subject to the LSE will not convert a property broker into a “household goods broker,” as FMCSA does not consider the underlying transportation to be the “transportation of household goods.”

Moreover, 49 CFR § 371.105 states that “[y]ou may only act as a household goods broker for a motor carrier that has a valid, active U.S. DOT number and valid operating authority issued by FMCSA to transport household goods in interstate or foreign commerce.” In other words, HHG brokers may not act as property brokers (“You may only act as a household goods broker...”). Unless HHG brokers have separate property broker authority, they are not permitted to perform brokerage of regular freight loads or for carriers that do not have valid HHG operating authority. Thus, a HHG broker is an entity that brokers transportation for a HHG motor carrier. However, as defined in 49 U.S.C. § 13102(12)(C), a motor carrier operating subject to the LSE is not considered a HHG motor carrier. Accordingly, the entity that brokers such transportation is not a HHG broker.

However, as with a container company that engages in activities associated with HHG movements, if a broker makes claims on its website or elsewhere about “full service moving” or other specialized services, FMCSA may investigate whether the broker meets the definition of HHG broker, i.e., “holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation of household goods by motor carrier for compensation.” 49 CFR § 371.103. If FMCSA makes such a finding, the broker would be subject to the consumer protection regulations

at 49 CFR Part 371, Subpart B “Special Rules for Household Goods Brokers.” In analyzing a broker’s regulatory status, FMCSA will look at whether the broker is making claims that it arranges services for HHG motor carriers as defined at 49 U.S.C. § 13102(12)(A). Those carriers offer some or all of the following services: Binding and nonbinding estimates, inventorying, protective packing and unpacking of individual items at personal residences and loading and unloading at personal residences.

In sum, only property broker authority is required when arranging for the transportation of shipments eligible for the LSE. However, if a broker also performs activities constituting the arrangement of “transportation of household goods by motor carrier for compensation” (49 CFR § 371.103), it needs HHG brokerage authority as well.

Issued on: March 25, 2013

Anne S. Ferro
Administrator

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